United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

ORIGINAL

75-7204

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 75-7204

MIKE J. BATCHKOWSKY,
Plaintiff-Appellee,

against

PENN CENTRAL COMPANY a/k/a PENN CENTRAL TRANSPORTATION COMPANY,
Defendant and Third Party Plaintiff-Appellee,

against

ANHEUSER-BUSCH, INC.,
Third Party Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF THIRD PARTY DEFENDANT-APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

PAGE

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Statement

This is an appeal by the third party defendant-appellant (Anheuser-Busch) from a judgment in favor of the plaintiff (Batchkowsky) against the defendant (Penn Central) in the sum of $150,000 and a judgment in favor of Penn Central in the same amount for contractual indemnity against Anheuser-Busch. The main case was tried before Honorable William C. Conner and a jury on January 27,

1975 et seq. The third party action was decided by Judge Conner without a jury and the Court's decision rendered February 25, 1975. Judgment was entered March 19, 1975. Anheuser-Busch filed a notice of appeal from the entire judgment on March 24, 1975.

The Facts

This is an action brought, pursuant to the Federal Employers Liability Act, by plaintiff against his employer Penn Central for personal injuries sustained on November 8, 1968 during the course of his employment with Penn Central as a freight brakeman at a railroad sidetrack at the Anheuser-Busch plant in Newark, New Jersey. Plaintiff testified that on the accident date, while he was standing on the ground level inside the Anheuser-Busch plant loading area but not on the loading platform and relaying signals from the conductor to the engineer for the entry of Penn Central freight cars into the loading area, he was struck by door handles protruding from the Penn Central cars (A21 to A41). Plaintiff further testified that he was out of work from the accident date to May 1969 (A61) when he returned to work with Penn Central in the capacity of brakeman as a car marker (A49) at the same rate of pay (A74). He continued working as a brakeman for Penn Central with intermittent loss of time (Plaintiff's Exhibit 26, A383) until early 1972 and has not worked since that time (A55 and A64). Although it was the testimony of the plaintiff's only treating physician, Dr. Burton, (A224 to A226) and the defendant's examining physician Dr. Balensweig (A296) that Batchkowsky was not totally unemployable and could perform certain jobs within the description of a brakeman, Batchkowsky testified that his symptoms worsened in 1970 and 1971 at which time he was advised by Dr. Burton to quit (A52) and has not attempted to return to work for Penn Central as a car marker on Dr. Burton's orders since March 1972 and has

not attempted to exercise his seventeen years seniority rights to obtain other work with the railroad (A65).

Batchkowsky further testified that in May 1970 while a passenger on a bus he was involved in a collision and was thrown forward against the seat in front of him and subsequently the floor (A68). Plaintiff brought suit as a result of that accident (A69) and claimed by way of answers to interrogatories in that action which were verified April 28, 1971 that he had sustained permanent injuries to his right wrist, hand and forearm which prevented him from grasping ladders and handles and prevented him from working as a freight conductor or brakeman (A271 and A272).

Dr. Burton testified that his diagnosis upon initial treatment in 1968 and 1969 was cervical sprain with pre-existing cervical osteo-arthritis (A211 to A215) which would resolve itself but that there was a marked deterioration of his condition in May 1970 (A207). The doctor further testified that the accident of May 1970 as described by plaintiff could cause the aggravation of plaintiff's pre-existing osteo-arthritic condition (A222).

Dr. Balensweig testified that his initial diagnosis in March 1969 was neck sprain and it was his opinion that the condition at that time was not permanent (A293 and A294). Dr. Balensweig also testified that the accident of May, 1970 as described by plaintiff could have a definite relationship to his present complaints (A293).

Anheuser-Busch was impleaded by Penn Central on the basis of the hold-harmless clause contained in Supplemental Agreement (Plaintiff's Exhibit 13, A379). The agreement calls for indemnity for injuries occurring on or under the "structure" defined in the agreement as the loading platform and adjoining the tracks. Plaintiff testified that he was not standing on the loading platform at the time of the accident which was not contested by any testimony at trial.

POINT I

The award of $200,000 to the plaintiff, even reduced by twenty-five percent Contributory Negligence, was grossly excessive.

Plaintiff's Exhibit 26 (A383) and Plaintiff's Exhibit 25 (A382), whose accuracy was stipulated to by all parties (A286) indicate a loss of pay from the accident date to May, 1972 of $11,720 which reduced by the claimed period of disability following the May 1970 (A286) accident give a total loss of pay of $9,900. Taking into account an increase of 22% for overtime, there is a total loss of income of $12,000. The claimed medical expenses are $810 (A219).

In light of the testimony of Dr. Burton and Dr. Balensweig that plaintiff was not totally disabled from employment and could work at jobs within the description of a brakeman and the further testimony by plaintiff that he did not attempt to return to work as a car marker or any other job with the railroad to which his seventeen years seniority would entitle him, the jury verdict of $200,000 reduced to $150,000 with contributory negligence was grossly excessive.

The further testimony of both physicians that the accident of May 1970 could have caused the plaintiff's present complaints is a basis for a finding of lack of proximate cause between the accident of November 8, 1968 and the plaintiff's present condition.

The jury verdict of $200,000 must have contemplated a substantial award for future lost earnings for which there is no basis in the record. In the case of *DeMauro* v. *Central Gulf SS Corp.* v. *International Terminal Operating Co., Inc.*, S.D.N.Y. Docket No. 74-2243, decided by Second Circuit, March 28, 1975, not yet officially reported, the plaintiff, a longshoreman, suffered a fracture of the femur which was surgically repaired by insertion of a pin. The

medical testimony was that plaintiff could not perform longshore work in the future but could do other manual work. In reversing and remanding as to damages the jury verdict of $200,000, this Court stated at page 2580:

> "It is on the issue of damages that we feel appellants have cause to complain. DeMauro sustained a fractured femur, which was fixed by open reduction and pinning, and a non-displaced fracture of the fibula. Both fractures healed properly and with good union. The medical experts disagreed concerning DeMauro's ability to perform the heavy manual labor and climbing required by his former job, but all were in accord that he was able to work. According to DeMauro, his attending physician discharged him from treatment in April of 1972, one year following the accident, and advised him at that time that he could return to work. DeMauro's medical specials were $5,049.37.
>
> We conclude that the jury's verdict of $200,000 must have been based in large measure upon a finding of permanent disability from employment which was not justified by the testimony and is therefore grossly excessive. We reverse and remand the case to the trial court for a new trial solely on the issue of plaintiff's damages unless plaintiff is willing to remit all damages in excess of $100,000. In the event that such remittitur is made within ten (10) days, the judgment will be affirmed with costs to plaintiff-appellee."

A motion having been made by the appellant to set aside the verdict as excessive and denied by the Court (A373), this Court has the power to examine the amount of this verdict and to set aside or reduce it if it is excessive. *Caldecott* v. *Long Island Lighting Company*, 417 F. 2d 994; *Dagnello* v. *Long Island Railroad Company*, 289 F. 2d 797; *Wicks* v. *Henken*, 378 F. 2d 395; *Sharkey* v. *Penn Central Transportation Company*, 493 F. 2d 685.

By all medical testimony in the case, the injury of plaintiff did not preclude him from continuing to do the work of a brakeman and the injury was therefore not a completely crippling or disabling one. In light of the loss of income in the amount of $12,000, the medical expenses in the amount of $810 and the medical testimony that the plaintiff is not totally unemployable, the jury verdict of $200,000 is clearly excessive and should be set aside or reduced.

POINT II

The Court's findings and conclusions with regard to the third party action were clearly erroneous and contrary to applicable law and weight of the credible evidence.

Following the lower court's mandate that New Jersey law controls, it has been held that under New Jersey law the rule is to ascertain and determine the intention of the parties, as of the time of making, as expressed by the language they employed when read and considered as a whole and in the light of the surrounding circumstances and the purposes they sought to attain. *Packard Englewood Motors* v. *Packard Motor Co.,* 215 F.2d 503 (C.A.N.J.)

The circumstances surrounding this agreement are that Anheuser-Busch contemplated reducing the standard 8′ clearance from the center of the track running through one of its terminals by extending the loading platform to a 6′1″ clearance as measured from the center of the same track. Anheuser-Busch also sought continuation of the services rendered by the Penn Central through said terminal. The Penn Central, however, claimed that because the standard 8′ clearance was being reduced it would seek to be held harmless for any injuries caused by this new 6′1″ structure, and in the reduced clearance space under and adjoining this structure. Consequently, a supplemen-

tary agreement was entered into (Plaintiffs exhibit 13, A379).

Under this agreement Anheuser-Busch agreed to hold harmless the Penn Central for injuries resulting from the operation of engines and equipment "* * * upon the side-track adjoining the said structure by reason of the 6'1" side clearance * * *" and also to indemnify and hold harmless the Railroad and its employees because of "* * * the operation by the Railroad Company of its engines, equipment and cars upon the said side-track under and adjoining said structure, or injury to or damage caused thereto or thereby, * * * and whether attributable in whole or in part to the said 6'1" clearances."

Courts should not and will not write contracts for the parties nor construe such contracts other than in accordance with the plain and literal meaning of the language used. *Independent Oil Workers at Paulsboro, N.J.* v. *Mobil Oil Corp.*, 441 F.2d 651 (C.A.N.J. 1971).

"Structure" is defined in the agreement as the *platform* with the reduced 6'1" clearance. The Court below misconstrued "structure" as meaning the entire terminal facility or Anheuser-Busch "plant". It was not the intent of the parties as expressed in the agreement to indemnify the Railroad for accidents occurring in the terminal facility for any accidents whatsoever but rather for accidents "by reason of" the said structure and "under and adjoining" the said structure or platform.

"Adjoining" according to Black's Law Dictionary, is defined as meaning:

> * * * touching or contiguous as distinguished from lying near to or adjacent. *Broun* v. *Texas & N.O.R. Co.*, Tex. Civ. App. 25 S.W. 670, 674; *Plainfield-Union Water Co.* v. *Inhabitants of the City of Plainfield*, 84 N.J. Law 634, 87 A. 448, 450. To be in contact with; to abut upon. *State* ex rel. *Boynton* v. *Bunton*, 141

Kan. 103, 40 P.2d 326, 328. And the same meaning has been given to it when used in statutes. *City of New York* v. *Alheidt*, 151, N.Y.S. 463, 464, 88 Misc. 524.

From plaintiff's own testimony it is clear that he was not injured "adjoining" the "structure" as those words are used in the agreement. In this connection it should be noted once again that this agreement represents the intent of both parties and at one point the word "adjacent" was replaced in the agreement by the word "adjoining", thus identifying the location of accidents to be indemnified.

Such agreements as the present should be literally read and construed against the proponent who in this case is Penn Central Railroad. What was intended by both parties is apparent from the clear meaning of the language used.

Moreover, it has been held that a basic canon of contract construction is that the court must look to the whole of an instrument and ascertain the intention of the parties from all that they have said rather than merely a part. *New Wrinkle* v. *John L. Armitage & Co.*, 233 F.2d 753 (N.J.C.A. 3d Cir. 1956).

This the lower Court did not do but in fact emphasized part of one sentence, viz: "*whether attributable in whole or in part to the said 6'1" clearances*". (Emphasis supplied by the Court below). The Court went on to reason that in any event the accident still came about in whole or in part because of the said 6'1" clearance. But the agreement when read as a whole qualifies the above with the clause "upon the said side track and under and adjoining said structure." Once again this injury did not occur upon the said side track under and adjoining said structure but rather occurred in an area of greater clearance not adjoining the 6'1" structure.

The Court below was clearly erroneous in its interpretation of this contract. If the lower Court's interpretation is adopted the supplementary agreement in fact becomes meaningless and irrelevant as to whether or not a new 6'1" structure was built or caused the injury. Such is not the intent of the parties.

Because the injury in question did not come within the terms of the supplemental agreement, the effect of finding the opposite, as did the Court below, would be to permit the Penn Central in effect to circumvent the liability imposed upon it under the F.E.L.A. It has been held that where Congress possesses the power to impose a liability it also possesses the power to insure its efficacy by prohibiting any contract, rule, regulation, or device in evasion of it. *Phila. Balt. & Wash. R.R.* v. *Schubert,* 224 U.S. 603 citing *Second Employers Liability Cases,* 223 U.S. 1 at 52. Moreover a reading of this Supplemental Agreement to cover the injury in question would enable the Penn Central to escape not only the F.E.L.A. liability but also the liability they assumed in the Side Track Agreement first entered into to "indemnify and hold harmless the Industry (Anheuser-Busch) for loss, damage or injury from any act or omission of the Railroad, its employees, or agents, to the person or property of the parties hereto and their employees, and to the person or property of any other person or corporation, while on or about said side track."

In conclusion, this injury *did* occur on or about said side track *but not upon, under or adjoining said structure as "structure" is defined in the supplementary agreement.* To hold otherwise is in effect to write a new contract for the parties which was not so intended by them in the first place.

Conclusion

The verdict in favor of the plaintiff should be set aside and a new trial ordered or reduced. The judgment in favor

of Penn Central on the third party action should be reversed and the third party complaint dismissed or the case should be sent back for a new trial.

Respectfully submitted,

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Due and timely service of TWO copies
of the within BRIEF is hereby
admitted this 30th day of MAY 1975

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